

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LARRY TARRER, et al.,

Plaintiffs,

v.

PIERCE COUNTY, et al.,

Defendants.

CASE NO. C10-5670BHS

ORDER

This matter comes before the Court on Defendants' Rule 39 and Rule 6 Motion for Jury Trial (Dkt. 71). The Court has reviewed the briefs filed in support of and in opposition to the motion and the remainder of the file and hereby denies Defendants' motion for the reasons stated herein.

I. PROCEDURAL AND FACTUAL BACKGROUND

On September 20, 2010, Plaintiffs filed their complaint in this matter, which did not include a jury demand. Dkt. 1. On December 6, 2010, Defendants filed their answer to the complaint, which did not include a jury demand. Dkt. 26. On January 26, 2011, Defendants made their jury demand in this case. Dkt. 28. On January 27, 2011, the

1 parties submitted their joint status report (Dkt. 29), which expressed Defendants' request
2 for a jury trial and Plaintiffs' belief that the jury demand was untimely. The Court, in
3 response to the joint status report, set this matter to be tried to a jury. Dkt. 30 (minute
4 order setting trial schedule).

5 On March 17, 2011, Plaintiffs moved to strike Defendants' jury demand. Dkt. 31.
6 On April 21, 2011, the Court granted Plaintiffs' motion and struck Defendants' jury
7 demand as untimely. Dkt. 38. On October 6, 2011, Defendants filed the instant motion
8 for jury trial under Rules 39 and 6 of the Federal Rules of Civil Procedure. Dkt. 71. On
9 October 17, 2011, Plaintiffs responded (Dkt. 72) and on October 21, 2011, Defendants
10 replied (Dkt. 75).

11 II. DISCUSSION

12 A. Jury Demand Standard

13 Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, a party may
14 demand a jury trial on any issue triable of right by a jury by serving the other parties with
15 a written demand "no later than fourteen days after the last pleading directed to the issue
16 is served." Fed. R. Civ. P. 38(b). The Seventh Amendment right to a civil jury is not
17 absolute and may be waived if the request for a jury was not timely. *General Tire &*
18 *Rubber Co. v. Watkins*, 331 F.2d 192, 197 (4th Cir.), *cert. denied*, 377 U.S. 952 (1964).
19 Nevertheless, because the right to a jury trial is fundamental, "courts must indulge every
20 reasonable presumption against waiver." *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393
21 (1937). A party waives the right to a jury trial under Rule 38 unless the demand is
22 properly served and filed. *Id.*; *see also, Solis v. Los Angeles*, 514 F.3d 946, 953-54 (9th

1 Cir. 2008); *Pradier v. Elespuru*, 641 F.2d 808, 810 (9th Cir. 1981). In its previous order
2 on the issue, the Court struck Defendants' jury demand as untimely under Rule 38(b).
3 See Dkt. 38.

4 If no demand for a jury trial is made, a court may, pursuant to a Rule 39(b)
5 motion, order a jury trial on any issue for which a jury might have been demanded. Fed.
6 R. Civ. P. 39(b). However, the Ninth Circuit has held that a district court's discretion
7 under Rule 39(b) is narrow and "does not permit a court to grant relief when the failure to
8 make a timely demand results from an oversight or inadvertence." *Zivkovic v. Southern*
9 *California Edison Co.*, 302 F.3d 1080, 1086-87 (9th Cir. 2002). "An untimely request for
10 a jury trial must be denied unless some cause beyond mere inadvertence is shown."
11 *Pacific Fisheries Corp. v. HIH Cas. & General Ins., Ltd.*, 239 F.3d 1000, 1003 (9th Cir.
12 2001). In addition, legal mistake "does not broaden the district court's narrow discretion
13 to grant an untimely jury demand." *Pacific Fisheries*, 239 F.3d at 1002 (9th Cir. 2001).
14 In *Pacific Fisheries*, the Ninth Circuit concluded that "counsel's reasons for his [or her]
15 errors are of no consequence," concluding that good faith mistakes of law and good faith
16 mistaken beliefs about what is necessary for a proper jury demand are still inadvertence
17 or oversight. See 239 F.3d at 1002-1003; see also *Zivkovic*, 302 F.3d at 1087 (concluding
18 that despite the leeway given to a pro se party, a good faith mistake as to the deadline for
19 demanding a jury trial establishes no more than inadvertence, which is not a sufficient
20 basis to grant relief from an untimely jury demand).

21 In addition, under Rule 6(b) of the Federal Rules of Civil Procedure, "[w]hen an
22 act may or must be done within a specified time, the court may, for good cause, extend

the time . . . on motion made after the time has expired if the party failed to act because of excusable neglect.” However, where counsel’s inadvertence or oversight is the only reason shown to excuse an untimely demand for a jury trial, there is no basis upon which the Court may grant relief. *See Pac. Fisheries*, 239 F.3d at 1002 (citing *Lewis v. Time, Inc.*, 710 F.2d 549, 556-57 (9th Cir. 1983), *overruled on other grounds by Unelko Corp. v. Rooney*, 912 F.2d 1049, 1052-53 (9th Cir. 1990)).

B. Defendants’ Motion

Defendants filed their answer in this action on December 6, 2010 (Dkt. 26), and on January 26, 2011, they filed an untimely jury demand (Dkt. 28). Defendants argue that the Court has discretion under Rules 39(b) and 6(b) to grant a jury trial in this action. Defendants rely on the reasoning from a California case, *Johnson v. Dalton*, 57 F. Supp. 2d 958, 960-61 (C.D. Cal. 1999), in which the district court granted a jury trial under Rule 39(b) for the following reasons:

First, Rule 39(b) clearly grants the Court “discretion” to choose to override the waiver provision of Rule 38. The Rules do not limit this discretion at all.

Second, adopting a flexible approach to Rule 39 comports with the general intent behind the Federal Rules of Civil Procedure:

Technical insistence upon imposing a penalty for failing to follow the demand procedure by denying a jury trial is not in the spirit of the Federal Rules. The rules do not limit the court's discretion in ordering a jury in cases in which there would have been a right to jury trial. The court ought to approach each application under Rule 39(b) with an open mind and an eye to the factual situation in that particular case, rather than with a fixed policy against granting the application or even a preconceived notion that applications of this kind usually are to be denied.

9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 2334 (footnotes omitted).

1 Third, although Ninth Circuit cases suggest more narrow discretion
2 to grant untimely motions for jury trial, the case law in general upholds the
discretion of the trial court.

3 Fourth, the Constitution guarantees a right to a jury trial. While the
4 waiver provisions raise no constitutional infirmity, it is more in keeping
with the spirit of the important right at issue to allow a trial judge to
reinstate the jury trial.

5 Fifth, a narrow reading of Rule 39(b) would in this case allow a
mistake by counsel to harm the client.

6 Sixth, the jury demand, while untimely, does not prejudice
defendant. The jury demand was made only a few months late. Trial is still
many months away. Defendant does not and could not claim prejudice.

7 Seventh, the right to trial by jury is especially important in this
8 particular case. In a case such as this one which involves serious allegations
of racial and sexual harassment and discrimination, the collective wisdom
9 of the community should act as a constant guide. When facing such volatile
issues, the input of the jury can increase the legitimacy and integrity of the
court system.

10 57 F. Supp. 2d at 961.

11 In *Johnson*, it appears that the district court analyzed the totality of the
12 circumstances, along with the text of Rule 39(b), to conclude that it had discretion to
13 grant a jury demand. However, here, the Court concludes that Defendants have not met
14 the strict requirements laid out by Ninth Circuit case law to show that under Rules 39(b)
15 or 6(b), they are entitled to relief from their untimely jury demand. Defendants have not
16 shown excusable neglect, or anything beyond oversight and inadvertence, in failing to
17 make a timely jury demand. *See Zivkovic*, 302 F.3d at 1086-87; *Pacific Fisheries*, 239
18 F.3d at 1003; *see also Beckham v. Safeco Ins. Co. of Am.*, 691 F.2d 898, 905 (9th Cir.
19 1982) (finding that attorney's mistaken belief that no demand was necessary was nothing
20 more than inadvertence and neglect). Therefore, under Ninth Circuit law, their motion
21 must be denied.
22

1 In addition to seeking a jury trial, Defendants argue, in the alternative, that the
2 Court should try the case with an advisory jury under Rule 39(c). The Court declines to
3 exercise its discretion to use an advisory jury in trying this case.

4 **III. ORDER**

5 Therefore, it is hereby **ORDERED** that Defendants' Rule 39 and Rule 6 Motion
6 for Jury Trial (Dkt. 71) is **DENIED**.

7 Dated this 22nd day of November, 2011.

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10 BENJAMIN H. SETTLE
11 United States District Judge
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